

BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

PATRICK G. MCFAUL, SR.,)	
)	
Appellant,)	
v.)	Appeal No. 2003-01
)	
SECRETARY OF THE DEPARTMENT OF)	
NATURAL RESOURCES AND ENVIRONMENTAL,)	
CONTROL OF THE STATE OF DELAWARE,)	
)	
Agency-Below,)	
Appellee,)	
AND)	
BAYVILLE SHORES CONDOMINIUM ASSOCIATION,)	
)	
Permittee-Below,)	
Appellee.)	

FINAL ORDER AND DECISION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above stated cause came before the Environmental Appeals Board on July 8, 2003, in the Auditorium, Richardson & Robbins Building, 89 Kings Highway, Dover, Kent County, Delaware.

PRESENT:

Donald E. Dean, Chairman

Stanley Tocker, Ph.D., Member

Peter McLaughlin, Member

Tjark Batemen, Member

Kevin R. Slattery, Attorney for the Board.

APPEARANCES:

Patrick G. McFaul, Sr., *Pro se*.

Jeremy Homer, Esquire, for Bayville Shores Condominium Association

Matthew Chesser, Deputy Attorney General, for the Agency

A hearing was held before the Environmental Appeals Board ("Board") on July 8, 2003, pursuant to the appeal of a permit to install a boat ramp and boat docking facility.

The appellant, Patrick G. McFaul, Sr., first contends that the Department of Natural Resources and Environmental Control ("DNREC" or "the agency") accepted an incomplete application from the Bayville Shores Condominium Association ("Bayville Shores" or "permittee"). Second, he contends that the agency did not consider the effects of the permit on the quality of life of the residents of Swann Keys. Lastly, he disagrees with the Secretary's finding that the Wetlands and Subaqueous Lands Section ("WSLS") response document adequately summarizes the issues involved in the permit approval.

It is the agency's contention that this appeal is a neighbor's objection to an appropriate land development. The proposed site is the most environmentally friendly location. The agency struck a compromise that included access and usage limitations, low wattage lighting, storm water management and a vegetative buffer. The only solution that is going to satisfy the appellant is to have the ramp built in someone else's back yard.

It is the position of the permittee, Bayville Shores, that the boat ramp is the least intrusive structure available. It is being developed exclusively on private subaqueous lands, and it serves the entire community of Bayville Shores. The proposal has no impact on wetlands and utilizes an already existing lagoon. The permittee has also agreed to permit restrictions to minimize its impact on the neighbors. It agreed to put in a landscape buffer, low voltage lighting, a dawn-to-dusk usage requirement and a four-stroke engine requirement. This appeal is a "not in my back yard" complaint and it is not truly based on environmental issues.

SUMMARY OF THE EVIDENCE

- 1) The Board considered the testimony of Patrick G. McFaul, Sr. ("appellant").

The appellant introduced into evidence photographs of the site in question. He testified that page A-2 of the permit application contains inaccurate responses. For item No. 6 on the application the permittee indicates "no" with regard to electricity. There will be lights at the facility, and they require electricity. Item number 15 addresses whether there is going to be any structure within ten (10) feet of the property line. On the application, the permittee indicates "no". The boat ramp staging area will be within 8 feet of his property line.

The appellant contends that a structure includes a blacktop surface. As a structure, the permittee is required to get permission from the contiguous property owners. He contends that the failure to include accurate information on the application is grounds for its denial or revocation.

On the notice issue, the appellant testified that Bayville Shores is required to notify all contiguous property owners, and accordingly, Bayville Shores is required to list the owners on the application. This did not occur as he was not included on the list and he was not notified of the public hearing.

On the issue of the navigability of the waterway, the appellant testified that the boat ramp will be on a dead-end lagoon. It also will require the destruction of some vegetation. There are wetlands all around the proposed facility. Wetlands will be affected. In addition, there will be dredging in the dead-end lagoon in order to make the boat ramp accessible.

According to the transcript from the July 25th hearing, the expert (Mr. Launay), testified that the waterway would be restricted to certain types of vessels. The lagoon is very shallow, and some of the neighbors in Swann Keys can only go out at high tide. The appellant reviewed with the Board the photographs from his original appeal filing.

On the final issue, the appellant testified that this project will destroy grasses, trees, and remove the ability of the land to absorb rainfall. This will cause run-off that will flood their properties. There will be chemical run-off from the blacktop as well as fumes from the cars and watercraft.

As to the potential flooding, the appellant testified that the permittee was allowed to elevate the ground level three to six feet above flood stage. Water run-off from Bayville Shores will cause flooding. It will also take place from tidal waters as they will be directed to the lower lying ground (i.e., Swann Keys).

As to air pollution, the appellant testified that the use of motor vehicles and watercraft will cause ozone. Appellant works in his garden on hot summer days and the ozone will affect him. With respect to regulation 3.01(B), it includes a consideration of any impairment of air quality.

Usage of the ramp is also a concern. Mr. Launay's figure regarding the usage of the boat ramp (of five (5) vehicles per day) is low. Bayville Shores will issue 60 gate passes. Appellant testified that he is going to have a flow of traffic from dawn to dusk--all the time. This is not the same as in Swann Keys where the owners put their boats in one time.

There will also be water pollution. Pursuant to a newspaper article, small fuel spills

add up. This is a dead-end lagoon with little flushing.

The buffer is inadequate. One tree spaced every eight feet will not filter the air pollution, and it will not block the noise. The noise and odor from the vehicles waiting to launch will pollute their home and yard. Depending upon the number of people using the ramp, they could be exposed to pollution for several hours every day.

On cross examination by the agency, the appellant testified that the original site plan did not include the lighting. The agency showed that part of the application does include lighting at the facility. The appellant testified that he was at the public hearing, provided information, and had the opportunity to speak with the agency officials involved with the permitting process. He believes he was prejudiced by not receiving the notice in a timely fashion. He was out of town at the time. Had a notice been mailed to him, he would have received it through the mail.

On further cross examination by the agency, the appellant testified that most of the homes in Swann Keys have water access. Pictures of boats are included in his exhibits. He states that there are over 500 homes in the development. Appellant owns a van and has a push lawn mower. One of the provisions of the permit is that Bayville Shores obtain a sediment and storm water control plan.

On cross examination by the permittee, the appellant testified that Swann Keys has a homeowners' association. There was no vote to appeal this permit approval by the association. When he bought his property, the lagoon existed, and he knew it bordered on another property that could be developed.

2) The Board considered the testimony of Andrew Whitman.

Mr. Whitman testified that he compared two bathymetric surveys at mean low tide, but he was unsure if the one presented represented the lagoon in question. He testified that he took a johnboat up to the end of the lagoon. He found the center of the lagoon to be navigable. This was done in August (2002) and he coordinated it with a low tide chart. He recorded the depths. Mr. Whitman further testified that the bathymetric survey (Exhibit #23) is a reduction of Exhibit #9 as presented at the public hearing.

On questioning by the Board, the witness testified that they went up to the point where the boat ramp would end. The propeller went down about a foot below the boat bottom. The boat, including propeller, went below water level about 18 - 20 inches.

3) The Board considered the testimony of French Donald Mackes.

Mr. Mackes testified that he has lived in Swann Keys since 1972, and he has owned land on Swann Point since 1987. He has seen the pictures included in the appeal. He is a boater. There are areas in the canal where a boat can get stuck. Lot thirteen is the last lot before Derrickson's Creek. The lagoon is very shallow. It has been gradually filling in. He has a 26 foot pontoon boat and other watercraft. There have been many instances where he has not been able to use his pontoon boat as it rests on the subaqueous land. These occasions have increased in the past few years due to the erosion on the other side of the lagoon. He observed a jetski kicking up mud going through the lagoon the other day at idle speed. This is the most shallow lagoon. Mr. Mackes testified that he received notification and a copy of the joint application form. The list shows 13 property owners, but there are 19 owners. This may be from an old list, since the developer subdivided five of

the lots.

On cross examination by the agency, Mr. Mackes testified that he continues to utilize his pontoon boat and has seen other watercraft utilize the lagoon. There are two boat ramps in Swann Keys. He has considered dredging, but the contractors indicated that extensive dredging could undermine the bulkheads as they were not installed very deep. Swann Keys has done some dredging in other areas of the development. Further erosion will cause his property to be less navigable.

On cross examination by the permittee, Mr. Mackes testified that he also opposes the permit. His area of concern is the erosion and silting. Other neighbors contribute to the silting problems, but there are only about six boats that utilize the lagoon at the present time. An additional sixty boats will greatly increase the silting problem. The most shallow area is at the mouth of the lagoon.

4) The Board considered the testimony of Ms. Jody Ann Levy.

Ms. Levy testified that she lives at 1 Swann Point. It is the farthest lot from the lagoon and backs up to Bayville Shores. She has owned her property since 2001. When she moved in, the lot beside her was a wooded lot. This has since been cleared and storage areas have been erected. As a result of the elevation of the property to her side, she has had flooding. The further increase in height at the boat ramp will cause an L-shaped gully next to her property. Every time it rains her side yard and driveway flood. She is concerned with the fumes and the effects on her children. She also is concerned with the storm water remediation plan. It will create ditches, stagnant water and mosquitos. Ms. Levy further testified that she did not receive notice of the public hearing.

On cross examination by the agency, Ms. Levy testified that she is not aware of any history of flooding in the area. She is aware that a sediment and storm water control plan is required by the permit. She owns two pieces of lawn care equipment: a lawnmower and a gas powered trimmer.

On cross examination by the permittee, Ms. Levy testified that she got notice of the meeting two days prior to it occurring. She and her husband both participated. The storage areas were not there when she purchased her home.

5) The Board considered the testimony of Andrew Whitman.

Mr. Whitman testified that he is an Environmental Specialist III, with the Wetlands and Subaqueous Lands section, and he has held this position since 1998. He was responsible for making sure Bayville Shores complied with the subaqueous lands regulations. The agency considers the application of Bayville Shores to be complete. Since the first application, Bayville Shores has made changes to the application. It restricted the access, required four-stroke engines, non-motorized vessels, landscape buffers and put land into a conservation easement. At the other potential sites there are impacts to 404 wetlands, state wetlands and public subaqueous lands. The site chosen was the best site in consideration of all the latter issues. Flood control issues are referred to the appropriate agency. This was done as a permit condition. The storm water management plan should alleviate some of the problems with flooding at Swann Keys.

The witness testified that with regard to the electricity issue, the lighting was included in the work description and on the site plan. The plans were available to the public at the July 25, 2002 hearing. The eight foot distance from the property line is not

in this section's jurisdiction. The 10 foot buffer applies to structures in the water and not on land. As far as the notice was concerned, the adjacent people directly affected by the waterway were notified. In his opinion, Mr. McFaul had plenty of notice of the hearing.

The witness testified that he took measurements of the lagoon at low tide to verify the navigability of the waterway. There is a section of the lagoon at the mouth that has siltation problems, but there is an area around which boats can navigate. It is common for lagoons such as this to be dredged if there is a hazard to navigation.

On cross examination by the appellant, Mr. Whitman testified that it is his job to apply the regulations to the application. He did not have a letter of "no-objection" from Mr. McFaul.

On cross examination by the permittee, the witness testified that the permittee agreed to lower the lighting to a height of three feet and to limit the hours of access. In the regulation, the definition of "structure" includes but is not limited to any boat ramp, slip, dock, jetty, etc. The witness stated that these examples are not construed to include a driveway.

On re-direct examination, Mr. Whitman testified that in terms of the regulations, the blacktop is an access road. When asked if this is a structure, he stated "no".

On questioning by the Board, the witness testified that the lighting will be three feet above grade (approximately 4 feet above the waterline). The lighting will be 50 watts. He has no idea how many bulbs are involved. There is some sporadic wetland vegetation at the point of access but it is not mapped. The alternatives to this site include more significant wetlands. There was some discussion about another location but it involved

public subaqueous lands, state regulated tidal wetlands and the federal wetlands. He took sporadic measurements in the lagoon that were routinely 2 feet at the center of the lagoon. There were other measurements to the side that were shallower. With the motor completely down, the boat propellor churned some sediment but went through. Their boat draws 8-10 inches.

6) The Board considered the testimony of William Moyer.

Mr. Moyer testified that he is the section manager of the WSLS. As far as the application is concerned, occasional discrepancies are allowed in what otherwise would be considered a complete application. The plans did include the low wattage lighting. The underground lighting is not considered a structure. As far as the notice issue is concerned, adjacent property owners are considered those on the right and left sides of the applicant where there is a question of whether there would be an affect on their navigation. Contiguous owners are those who would be immediately affected--not miles away. Historically, they notify those property owners on the waterway. This is an unwritten interpretation. Mr. McFaul's property is not affected by the activity on the lagoon, however, Mr. McFaul fully participated in all aspects of the public hearing both before and after.

In regard to the site itself, the witness testified that it involves private subaqueous lands. All other sites affected public subaqueous lands and state regulated tidal wetlands. At those sites, the ramp would be constructed on state-owned subaqueous lands. This site had the least impact.

In this case, dredging would increase flushing in the lagoon. There was also some consideration given by the permittee to dredging the mouth of the lagoon at the time of the

1999 application. They considered other ways to reduce impacts such as the four stroke engines, restricting access, a card access system and the lower wattage lighting. There are methods to enforce violations of the permit conditions: criminal penalties or revoking the permit. The residents of Swann Keys would be the best monitors of the permit's conditions.

There are some wetlands consisting of fragmite bordering the lagoon. Fragmite is not a wetlands species. These wetlands are not as valuable as the naturally occurring fringe systems out on the open water.

With regard to the 10 foot setback, the structures they were originally targeting were docks. This led to a navigational hazard for adjacent property owners. The 10 foot setback was an added condition that allowed owner's to go within 10 feet of the imaginary property line extending out into the water, with permission from owners on either side. It was not intended to be a ten foot setback from some upland structure, but a structure in the subaqueous land. He does not consider a driveway to be a structure within the definition of the Subaqueous Lands regulations.

With regard to dredging, the witness testified that the dredging is not to obtain suitable depth for navigation, but to be able to install the ramp itself. It is more maintenance dredging to what had been the original depth of the lagoon.

On cross examination by the appellant, Mr. Moyer testified that none of the lighting is actually on the courtesy pier but on the upland around the lagoon. He also testified that the 10 foot buffer pertains to subaqueous land regulations, not upland regulations. Mr. Moyer also stated that according to the scope of his program, the appropriate homeowner's

were notified of the hearing. His information regarding the meeting between Bayville Shores and Swann Keys came from Mr. Homer. Whether the lagoon was to be further dredged or not was not a consideration in their review of the permit application as it had been rejected by the Swann Keys residents. Mr. Moyer was not present at any meeting where an offer of dredging would either have been offered or considered.

On cross examination by Bayville Shores, Mr. Moyer testified that the criteria in 3.03(B)(13) says dredging "should" be evaluated, not "shall" be evaluated. There is an option to look at the application and determine the impacts of dredging. A balancing of the factors in the regulations (3.03(B)) must be conducted.

On examination by the Board, Mr. Moyer testified that the Subaqueous Lands Act pertains to the bottom of a body of water. An Attorney General's opinion, years ago, opined that the ownership of subaqueous lands remained with whomever owned the land when the lagoon was dug. In this case, half is owned by Swann Keys and half by Bayville Shores. He stated that the water body itself is public waters and boaters would have access coming into the lagoon from the creek, as long as they did not anchor or tie to a dock. The witness also testified that 60 passes are being issued. He is assuming that means any type of boat. When asked about notification, Mr. Moyer stated that contiguous neighboring lands referred to those touching the water. He testified that the Marine Police would enforce speeding violations.

7) The Board considered the testimony of Edward Launay.

Mr. Launay testified that he is the president of Environmental Resources, Inc. He is a certified wetlands scientist with 25 years experience in wetlands, wetland mitigation,

land use and state and federal permitting.

Mr. Launay testified that he was the environmental consultant for the entire project. He performed a wetlands delineation study. He represented the project to obtain certain state and federal permits. He was also involved with the property owners and project owners in order to develop water access for the project. He prepared the application for this permit.

On the issue of notice, Mr. Launay testified that the interest is with the people adjacent to the lagoon itself. He tried to put together a more extensive list through tax records. He is not aware of anyone on the lagoon who was unaware of the public meeting. He met with the homeowners association of Swann Keys in 1999. Subsequent to the public meeting on the first application, there was a re-submittal of the application and a second public hearing. There were written comments that were received from Mr. McFaul and others.

Mr. Launay testified that lighting is proposed along the walkway. There is no electricity or water available for public convenience. The dredging is for the purpose of getting the proper ramp contour, using a minimal amount of maintenance dredging. A storm water management plan application has been submitted to the Sussex Conservation District, and he is currently waiting for their response. The Land Tech survey shows an average depth of 2.5 - 3 feet at the center of the lagoon. There are some more shallow depths at the mouth of the lagoon down to 1.4 feet. The other waterways in the project are really more like drainage ditches and are silted in. They are not navigable. The other potential boat ramp site would impact about ½ acre of wetlands. All the other access

points were too shallow and would require extensive dredging. The ramp provides minimal access and the bulkhead adjacent to the ramp would accommodate 3 vessels. As a condition of the permit, the Department would encourage a deed restriction and environmental easement that would prevent Bayville Shores from developing any further along its wetlands property. He found no appreciable erosion alongside the lagoon between 1992 and 1997 based upon the aerial photographs. It would require 16.4 feet of erosion to result in 1 foot of sedimentation at the bottom of the lagoon.

The witness testified that the EPA is moving to a requirement that all vessels use a four-stroke engine. The motors are quieter and provide less emissions.

On cross examination by appellant, the witness testified that he provided the list of contiguous property owners to the agency. This list was obtained from tax records and he did his best to notify people. For Ms. Levy at least, the record of her transaction would not have been on the tax records because her house was purchased a month or two before the hearing. He does not know why some of the lagoon front owners did not receive their notice of the public hearing. The small amount of dredging spoils will be deposited inside a silt fence to dry out and then used as bulk fill material. There is no permanent mooring area. The deed restriction is permanent.

On cross-examination by the agency, the witness testified that if Swann Keys was built on marshland, the spoils from the canals would have contributed to Swann Keys flooding problems. The spoils have poor permeability. In addition, the grading for the development was essentially flat without roadside swales or retention basins to deal with runoff coming off the street and into yards.

On examination by the Board, the witness testified that no fueling would be permitted at the ramp. In addition, there is a list of prohibited activities in the application. In this community, no more than 25% of the residents will own a boat. Even on a busy day, only 5% of those boats would be out on the water. That is why they only placed eight parking stalls. The lighting is aimed more for purposes of safety in case of pedestrians using the walkway.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The appeal before the Board consists of four relevant issues pertaining to the permittee's application, notification of the public hearing, navigability of the waterway in question, and the agency's consideration of the factors contained in section 3 of its subaqueous lands regulations. The Board considered each issue in turn as follows.

I. Permittee's Application

The first issue raises the question of whether the Secretary of the Department of Natural Resources and Environmental Control ("Secretary or DNREC") properly considered, processed and approved Bayville Shores' permit application. The appellant contends that the application was not complete and contained inaccurate, misleading and/or false information. Appellant appears to contend that in some manner DNREC relied upon this information in granting the permit and did not require respondent Bayville Shores to obtain the necessary permissions from contiguous property owners. In particular, appellant argues that on page A-2 of the application, the respondent, Bayville Shores, should have disclosed the intended installation of "electricity" at the project. Appellant

further contends that on the same page of the application, the respondent should have indicated that its blacktop will be within ten (10) feet of the property, and appellant asserts that a blacktop surface constitutes a "structure" or a "convenience structure" as defined in the regulations' definitions.

Appellant's issue with the permittee's application concerns Appendix A entitled "Boat Docking Facilities". Item number 6 on page A-2 asks "[w]ill any structure(s) be built on the boat docking facility? (i.e. handrails, **electric** or waterlines, dock box, fish cleaning station, etc.)." (Emphasis added). The permittee indicated "No" in response to this inquiry. Item number 15 on the same page asks "[w]ill any portion of the structure or any vessel be placed within 10 feet of your property line?" The permittee again indicated "No" in response to this inquiry. Thereafter the application states that if the answer were "Yes", "a letter of no objection from the adjacent property owner must be included with this application."

Appellant contends that as the permittee intends to install low voltage lighting along the walkway portion of the project, this constitutes "electric" and, therefore, the permittee misled the agency in its application. Appellant further contends that the asphalt drive leading up to the boat ramp constitutes a "structure" or "convenience structure" as defined in the definitions. As this drive is to be installed within 10 feet of the appellant's property, and as the appellant objects to its installation, the permittee has misled the agency and has not complied with the conditions of the regulations and application. The appellant concludes that the misleading information justifies revocation or denial of the permit pursuant to sections 1.10 and 2.02 of the regulations.

The Board agrees with the position of the agency that not every initial permit application received by it is going to be approved in precisely the terms set forth in that application. The permitting process is often fluid with modifications being made as the agency and public provide input into the process. As Mr. Moyer testified, occasional discrepancies are allowed in what would constitute a complete application. Here, Mr. Launay testified that no electricity or water will be available for public convenience. While the appellant does not make a distinction between the supply of electricity for public convenience and the supply of electricity for the purpose of lighting, it is apparent to the Board how such a distinction was made by the permittee. We adduced no intention on the part of the permittee to mislead the agency. In fact, the plans submitted with the application clearly indicate the intended placement of the low voltage lighting along the walkway. Had the permittee indicated "yes" to item number 6 on the application, the only requirement would be to submit plans indicating the location and dimensions of the electric structure. Here, the permittee submitted such plans.

We also agree with the agency's position regarding the asphalt drive. The regulations' definitions of "structure" and "convenience structure" do not specifically enumerate blacktop surfaces among the examples provided in the definitions themselves. In this instance, however, the Board does not reach the question of whether an asphalt surface constitutes a "structure" under the regulations. We have concluded that the regulations are not applicable to the asphalt drive in this matter.

The analysis must start with the objective of the applicable statutory section and regulations which is to protect the public's interest in tidal and non-tidal waters and

wetlands. As Mr. Moyer testified, the ten foot setback was intended to target docks. The setback insures adequate navigation and prevents an owner of private subaqueous lands from creating a navigational hazard for adjacent property owners. The setback was intended to apply to structures actually in or on the subaqueous land and not an upland structure. While upland structures that might potentially impact the subaqueous lands may fall within the jurisdiction of the agency (see regulation 1.07), the Board finds in this case that the asphalt drive in question is an access road and is tangential to the structures intended to be subject to the agency's regulation.¹ Furthermore, there is no testimony to establish that any chemical runoff from this asphalt surface would be injurious to the ecosystem or water quality of the lagoon.

The Board gives the agency interpretation of its regulations great weight in this instance. Its interpretation is consistent with the plain language of the regulations when read as a whole. As an example, the asphalt drive parallels the storm water drainage system to be installed under the permit. Such drainage system excavation is exempt from agency approval under these regulations. See section 1.08(D). It makes little sense that the agency would exempt this modification of the upland portion of the boat launching facility and yet require the parallel and contiguous asphalt surface to be subject to its rules. As the asphalt surface is not within the purview of the agency's regulation under the subaqueous lands section of the statute, the ten-foot setback requirement of the regulation as well is inapplicable.

¹This does not mean that in another scenario such an asphalt surface would not be subject to regulation.

II. Notification of the Public Hearing

The second issue raises the question of whether the agency and Bayville Shores violated appellant's due process by failing to include him in the list of contiguous property owners entitled to notice of the proceedings, and consequently, in failing to notify him directly of the public hearing in the matter.

It is undisputed that appellant was not listed by the permittee and did not receive direct written notification of the public hearing held on July 25, 2002. Mr. Launay testified that he utilized the Sussex County tax records to compile a list of those property owners adjacent to the lagoon. This would not have included the appellant. The permittee contends the failure to directly notify the appellant resulted in no prejudice to the appellant as he attended the July 25, 2002 public hearing and presented his objections to the proposed project. The Board agrees.²

Mr. McFaul has participated in all aspects of this case fully and completely. He was involved in the 1999 proceedings, presented written comments related to the second application, participated in the public hearing in July of 2002, and has presented justiciable issues before this Board in his administrative appeal. He has not, however, shown the Board how he has been prejudiced by the lack of direct notification. Moreover, the statute requires only that the agency provide notification of the permit application via publication.

²For the reasons set forth in this opinion, the Board need not consider whether the appellant as an adjacent property owner, but not contiguous to the lagoon, should have received direct notice.

This was done.

III. Navigability of the Waterway

The next issue raises the question of whether Bayville Shores accurately represented, and whether the agency properly considered, the navigability of the waterway in the Secretary's decision to grant the permit.

The appellant makes specific reference to the Subaqueous Lands Regulation number 3.03(B)(13) in connection with his position that the waterway is not navigable. This section states in pertinent part that: "[d]redging to obtain navigable water depths in conjunction with private residential boat docking facilities should be avoided." The appellant has introduced a number of photographs that show low water levels in the lagoon at various low tides. He contends that without the dredging, the users of the permittee's launching facility will not be able to reach navigable water in the lagoon.

We agree as well with the agency's position on this issue. The testimony of Mr. Whitman indicates that the center of the lagoon is navigable at low tide, even if only barely. He presented his bathymetric survey at the July, 2002 public hearing. Mr. Whitman also testified that he, personally, took a watercraft into the lagoon and went up to the point at which the proposed boat ramp would end. The boat and propellor went below the water level at that point approximately 18 to 20 inches. This testimony establishes to the Board's satisfaction that while the type of boats that can use this facility will be limited, the lagoon is navigable. The dredging, therefore, is not for the purpose of obtaining navigable water depths. As Mr. Launay testified, the dredging is to obtain the proper ramp contour.

In addition to this testimony, both Mr. Whitman and Mr. Moyer testified that they considered alternative sites for the boat ramp. The other sites involved public subaqueous lands, state regulated tidal wetlands and federal wetlands. As Mr. Launay testified, the other sites were on non-navigable waterways, or they would impact a ½ acre of wetlands. The proposed site has the least overall impact as it is on private subaqueous lands and utilizes an already existing lagoon. Given this testimony, the Board finds that the agency gave proper consideration to the navigability of this, and other, waterways in its permit decision.³

IV. Consideration of Section 3 Criteria

The appellant's final issue requires the Board to consider whether the agency fully considered all the factors related to the aesthetic and environmental impacts of the project on the surrounding area. Appellant contends that DNREC did not adequately take into consideration the factors of flood control, pollution and the buffer between the project and the adjacent properties. The Board disagrees.

Section 3.01(B)(1) of the Subaqueous Lands Regulations provides the laundry list of criteria to be considered by the agency when evaluating the environmental impacts of the siting of boat docking facilities. Among these criteria are:

- a. Any impairment of water quality....

³Permittee, Bayville Shores, raised an objection to the appellant presenting this argument to the Board on the basis of standing. Permittee contends that as the appellant owns no property contiguous to the waterway, he lacks standing to raise this issue. Given the Board's findings on this issue, we do not need to consider the objections to the appellant's standing to pursue this issue.

- * * *
- c. Any harm to ... other flora and fauna and their habitats.
 - * * *
 - e. Any impairment of air quality ... including noise, odors, and hazardous chemicals.
 - f. The extent to which the proposed project may adversely impact natural surface and groundwater hydrology and sediment transport function.

Section 3.01(B)(4) of the regulations requires the agency to consider whether any “significant impacts or potential harm” can be offset or mitigated. In addition to these factors, appellant also cites section 3.03(B)(2) which states in pertinent part: “[s]tructures should be constructed to avoid dredging ... with minimal impact on aquatic vegetation and wetlands, and without dead-end or poorly flushed lagoons.”

With regard to the last consideration, the appellant contends the ramp will be located on a dead-end lagoon and that wetlands will be affected. This issue was addressed in the agency’s response document. Mr. Whitman noted in his report that the permit site is preferred due to the minimal environmental impacts in comparison to the alternative sites. The ramp will be located in **an already existing** established and navigable lagoon. The Board emphasizes this fact as it distinguishes this case from one where an applicant seeks to construct a dead-end or poorly flushed lagoon. It is the Board’s conclusion that section 3.03(B)(2) is a criteria to be considered in siting a boat ramp where dredging would result in a dead-end or poorly flushed lagoon. This site utilizes a pre-existing construct.

In addition, Mr. Whitman noted in his report that there would be no tidal or non-tidal wetland impacts at the proposed site. While he testified that there is some sporadic

wetland vegetation at the site, the site is not mapped as a wetland. Mr. Moyer also noted there is some fragmite bordering the lagoon, but that fragmite is not a wetlands species. The Board agrees with the agency's position that this is essentially an uplands area with some minimal, non-wetland species vegetation at the fringe. The alternatives to this site would impact more environmentally sensitive areas.

With regard to the flooding concerns, the agency has also addressed this issue. In the response document, Mr. Whitman noted that the permit would be conditioned upon the implementation of an approved stormwater management plan. Mr. Whitman also testified that the storm water management plan should alleviate some of the problems with flooding in the appellant's development.

The agency further considered the appellant's concerns with air quality and water quality. By limiting the ramp to vessels with four-stroke motors, this will reduce emissions and noise at the site. By limiting access to the site to sixty vessels—all of which would not be utilized during any particular day during the peak summer months—the opportunity for excessive emissions and noise is eliminated. In addition, the agency notes that were the residents of Bayville Shores required to travel to access a public boat ramp, vehicle emissions would actually increase. The agency has further limited the hours of access from dawn to dusk and required a vegetative buffer to be planted along the boundary line to minimize noise and disturbance from the boat launching area. While these conditions to mitigate the effects upon the neighboring community may not satisfy the appellant, they are reasonable and the agency gave the neighbors concerns due consideration. The alternative would be to place the boat ramp in a more environmentally sensitive area that

would affect public subaqueous lands.

STATEMENT OF DETERMINATION

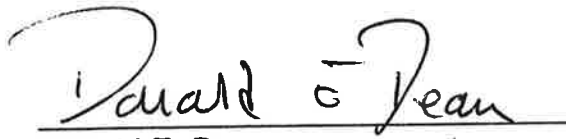
In conclusion, the Board agrees with the agency's decision in this matter. The site chosen has the least environmental impact and best protects the public's interest in subaqueous lands and wetlands. While we sympathize with the appellant's situation in having the land immediately adjacent to his property developed, it appears that the only condition that would satisfy him is to have the boat ramp located at an entirely different location away from his property. While the agency is required to consider the effects upon neighboring communities, its overall goal here is to protect the public's interest in its subaqueous lands and wetlands. It has done so in its consideration of this permit. By unanimous vote, the Board affirms the Secretary's decision to issue the permit to Bayville Shores for the construction of its boat ramp and boat launching facility.

SO ORDERED this 3rd day of October, 2003.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: 9/25/03


Donald E. Dean
Chairman